

Service Date: May 13, 2014

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER OF the Application of) REGULATORY DIVISION
NorthWestern Energy for Hydro Assets) DOCKET NO. D2013.12.85
Purchase) ORDER NO. 7323j

PROTECTIVE ORDER

PROCEDURAL HISTORY

1. On December 20, 2013, NorthWestern Corporation, doing business as NorthWestern Energy (NorthWestern), filed its *Application for Hydro Assets Purchase* (Application) with the Montana Public Service Commission (Commission).
2. On February 20 and 21, 2014, the Commission issued Data Request PSC-130, and the Montana Consumer Counsel (MCC) issued Data Request MCC-202, both of which “requested a series of documents provided to NorthWestern by PPL Montana in an online data room during the course of negotiations of the proposed transaction.” Aff. Charles S. Baker ¶ 2 (Apr. 22, 2014); *see* Test. of Joseph M. Stimatz 7:12-14 (Dec. 20, 2013) (PPL Montana “provided access to an electronic data room that contained . . . information needed for NorthWestern's due diligence.”).
3. On March 3, 2014, NorthWestern filed separate “*Objections to Data Requests PSC-130*” and “*Objections to Data Requests MCC-202*.”
4. On March 4, 2014, NorthWestern filed a separate *Withdrawal of Objection to Certain Documents Requested in Data Request PSC-130* and *Withdrawal of Objection to Certain Documents Requested in Data Request MCC-130*.
5. On March 10, 2014, the MCC filed a *Response to Objections* to respond to NorthWestern’s objection to Data Request MCC-202.
6. On April 4, 2014, the Commission overruled NorthWestern’s objection to PSC-130 and MCC-202 and ordered it “to provide any outstanding documents.” Notice of Commn. Action (Apr. 11, 2014).

7. On April 22, 2014, NorthWestern filed a *Motion for Protective Order of Confidential Contract Information Provided in Responses to Data Requests MCC-202 and PSC-130 and Brief in Support* (Motion), as well as the *Affidavit of Charles S. Baker*.

8. On April 24, 2014, the Commission published notice of the Motion in its agenda.

FINDINGS OF FACT

9. NorthWestern and PPLM seek to protect “detailed information on the technical specifications, operational capacity, and design of certain hydroelectric facilities to be acquired” (Technical Information) and “pricing and bid information from the contractors” (Pricing Information) contained within “individually negotiated, bilateral contracts between PPL Montana and contractors.” *Aff. Baker* at ¶ 2.

The Technical Information for which protection is sought contains detailed information prepared by contractors and PPL Montana about the scope of work for the design, manufacture, construction, and/or installation of equipment at certain hydroelectric facilities to be acquired. The Technical Information includes specific details of the contractor's bids, including, among other details, (1) intricate explanations of the scope of work, (2) engineering and design details of construction and installation techniques and equipment, including technical drawings and schematics, and (3) comprehensive descriptions of the operational capacity and features of generation and transmission equipment to be designed, manufactured, and/or installed. The Pricing Information contains itemized prices from contractor's bids, including specific rates for labor and the cost of materials and services. The Technical and Pricing Information is also included in change orders appended to certain contracts. The Pricing Information in the change orders contains detailed costs, invoices, and receipts from contractors, some of which identify **personal information of contractor's employees, such as salary information and social security numbers.**¹ The change orders also reflect negotiated prices agreed upon between PPL Montana and contractors.

Id. at ¶ 5 (emphasis added).

10. NorthWestern has considered that the Commission is a public agency and that there is a presumption of access to documents and information in the Commission's possession. *Mot.* p. 2 (Apr. 22, 2014).

11. The Technical and Pricing Information constitute “material observations, data, and facts in the nature of individually negotiated, bilateral written contracts between PPLM and contractors.” *Id.* at p. 5.

¹ The Commission grants protection to this information on separate grounds. *Infra* ¶¶ 21-25.

12. According to Charles S. Baker, the Controller for PPL Montana, the Technical and Pricing Information is “not available anywhere publicly, either in financial disclosure documents, regulatory filings or elsewhere, and is treated as extremely sensitive and confidential by PPL Montana and its affiliates.” Aff. Baker at ¶¶ 4, 6 (“PPL Montana provided to NorthWestern this Technical and Pricing Information on the basis that NorthWestern had entered into a confidentiality agreement”). “No public documents exist which could reveal this information by any means,” and “no one could reasonably ascertain this information by accessing any publicly available information.” *Id.* at ¶ 8.

13. NorthWestern and PPL Montana assert that disclosure of the PPL Capital Expenditures “would produce significant financial harm to PPL Montana”:

Disclosure of the information would give competitors and potential competitors free access to detailed proprietary design and operation information for which PPL Montana has contracted and paid contractors. Competitors and potential competitors could use this insight on the design and operation of the hydroelectric facilities to minimize their costs by working from the Technical Information already developed by PPL Montana and its contractors. Competitors and potential competitors could also use the information to discern operational limitations or maintenance requirements that may affect the amount of supply PPL Montana has available for sale at a particular time. Competitors could then take advantage of this information to position their own assets to capitalize on PPL Montana's need to purchase electricity from the market. . . .

If released, contractors that submit bids to PPL Montana would be able to see past rates that PPL Montana has agreed to for labor or particular services or materials. Contractors may then escalate their bids to provide labor, services, and materials to PPL Montana based on their knowledge of PPL Montana past valuation and agreement. . . . The Pricing Information contained in the change orders appended to the contracts also reveals information regarding PPL Montana's practices for reviewing and authorizing contract rate increases, which if released to potential contractors, could affect PPL Montana's ability to manage costs of future projects. Additionally, the Technical and Pricing Information reflects the considerable effort and time of contractors to develop precisely engineered designs, detailed descriptions of construction and installation methods, and cost estimates.

Id. at ¶¶ 9-11; Mot. at pp. 7-9.

CONCLUSIONS OF LAW

14. The Montana Constitution imposes “an ‘affirmative’ duty on government officials to make all of their records and proceedings available to public scrutiny. . . . regardless of . . .

other competing constitutional interests. . . .” *Great Falls Tribune v. Mont. Pub. Serv. Commn.*, 2003 MT 359, ¶ 54, 319 Mont. 38; *see also* Mont. Code Ann. § 69-3-105 (2013) (generally requiring records and papers “of every nature” to be “open to the public.”).

15. “The facts and legal analysis contained in a request for protective order must make clear to the [C]ommission the basis for the request, and must make a *prima facie* showing of confidentiality.” Admin. R. Mont. 38.2.5007 (2014) (the information claimed to be confidential must be “a trade secret or otherwise legally protectible.”).

16. “Unless the [C]ommission has granted a waiver,” a motion for protective order must include:

a complete and specific nonconfidential identification, description, and explanation of the information, item by item or by category of items which are alike, of all information for which protection is requested, suitable for meaningful use in testimony, arguments, public discussion, orders, and the public record.

Id. at 38.2.5007(3)(b).

Trade Secrets

17. The Commission “may issue a protective order when necessary to preserve trade secrets . . . as required to carry out its regulatory functions.” Mont. Code Ann. § 69-3-105(2).

18. “[A] trade secret is one form of information in which there is a statutorily defined property right.” *Great Falls Tribune*, ¶ 59. An entity seeking to protect a trade secret “must support its claim of confidentiality by filing a supporting affidavit making a *prima facie* showing that the materials constitute property rights which are protected under constitutional due process requirements.” *Id.* at ¶ 56. “The claimant’s showing must be more than conclusory” and “specific enough for the [Commission], any objecting parties, and reviewing authorities to clearly understand the nature and basis of the . . . claims to the right of confidentiality.” *Id.*

19. If the claimed basis for protection is trade secret,” a motion for protective order must demonstrate that:

- (i) The provider has considered the Commission is a public agency and that there is a Constitutional presumption of access to documents and information in the Commission’s possession;
- (ii) the claimed trade secret material is information;
- (iii) the information is secret;

- (iv) the secret information is subject to efforts reasonable under the circumstances to maintain its secrecy;
- (v) the secret information is not readily ascertainable by proper means; and
- (vi) the information derives independent economic value from its secrecy, or that competitive advantage is derived from its secrecy.

Admin. R. Mont. 38.2.5007(4)(b).

20. With the exception of the personal information about contractors' employees discussed below, NorthWestern has demonstrated that the Technical and Pricing Information described above is not readily ascertainable by proper means, is subject to reasonable efforts to maintain its secrecy, and derives independent economic value from its secrecy. *Supra* ¶¶ 9-13. NorthWestern has therefore made a *prima facie* showing that this information consists of trade secrets "protected under constitutional due process requirements." *Great Falls Tribune*, ¶ 56.

Individual Privacy

21. According to the Constitution of the State of Montana, "No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure." Mont. Const. art. II, § 9.

22. "If the claimed basis for protection is individual privacy," a motion for protective order must demonstrate:

- (i) the provider has made a reasonable effort to contact the individual to ascertain whether the individual waives the right to privacy for the information at issue;
- (ii) the individuals with potential privacy interests have actual, subjective expectations of privacy in the information at issue;
- (iii) society recognizes such expectations of privacy as reasonable; and
- (iv) the demand of individual privacy clearly exceeds the merits of public disclosure.

Admin. R. Mont. 38.2.5007(4)(a); *see Billings Gazette v. City of Billings*, 2013 MT 334, ¶ 18 ("Actual expectation of privacy is necessarily a question of fact that requires a determination of whether the individual whose privacy is at issue had notice of possible disclosure.").

23. "Protective orders . . . may waive certain of these rules." Admin. R. Mont. 38.5.5008(1); *see also* 38.2.5002(2) (requests for waiver "may be granted for good cause");

38.2.305 (“As good cause appears and as justice may require,” the Commission “may waive the application of any rule, except where precluded by statute.”).

24. With respect to the “personal information of contractor's employees, such as salary information and social security numbers,” the demand of individual privacy clearly exceeds the merits of public disclosure; that information is “otherwise legally protectable.” Aff. Baker ¶ 5; Admin. R. Mont. 38.2.5007(2). To the extent NorthWestern did not make the showing required by Section 38.2.5007, the Commission waives the rule with respect to that information. *Supra* ¶ 23.

ORDER

IT IS HEREBY ORDERED THAT:

25. NorthWestern’s Motion is GRANTED; and

26. Information submitted in accordance with this Order be treated as confidential pursuant to Title 38, Subchapter 50 of the Administrative Rules of Montana.

DONE AND DATED this 6th day of May, 2014, by a vote of 4 to 0. Commissioner Kavulla abstaining.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

W. A. GALLAGHER, Chairman

BOB LAKE, Vice Chairman

KIRK BUSHMAN, Commissioner

TRAVIS KAVULLA, Commissioner

ROGER KOOPMAN, Commissioner

ATTEST:

Aleisha Solem
Commission Secretary

(SEAL)

Protective Orders and Protection of Confidential Information

Nondisclosure Agreement

(7-26-00)

ARM 38.2.5012

Docket No. D2013.12.85, Order No. 7323j

Order Action Date: May 6, 2014

I understand that in my capacity as counsel or expert witness for a party to this proceeding before the commission, or as a person otherwise lawfully so entitled, I may be called upon to access, review, and analyze information which is protected as confidential information. I have reviewed ARM 38.2.5001 through 38.2.5030 (commission rules applicable to protection of confidential information) and protective orders governing the protected information that I am entitled to receive. I fully understand, and agree to comply with and be bound by, the terms and conditions thereof. I will neither use nor disclose confidential information except for lawful purposes in accordance with the governing protective order and ARM 38.2.5001 through 38.2.5030 so long as such information remains protected.

I understand that this nondisclosure agreement may be copied and distributed to any person having an interest in it and that it may be retained at the offices of the provider, commission, consumer counsel, any party and may be further and freely distributed.

Typed or Printed Name

Signature

Date of Signature

Business Address:

Employer

Party Represented